RESTRICTING ACCESS TO FEDERAL HABEAS CORPUS: JUSTICE SACRIFICED ON THE ALTARS OF EXPEDIENCY, FEDERALISM AND DETERRENCE

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INTRODUCTION

The access of state prisoners to federal habeas corpus has been under attack for decades, and the attack seems certain to continue in the future. The United States Supreme Court, for example, has imposed important limitations on federal habeas.[1] Similarly, congressional proponents of additional limita-

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1. The Supreme Court has imposed a myriad of limitations on the access of state prisoners to federal habeas corpus over the past few decades. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (precluding access to federal habeas for state prisoners claiming a fourth amendment violation unless the prisoner demonstrates that she was deprived of a full and fair hearing at the state level); Wainright v. Sykes, 433 U.S. 72 (1977) (state prisoners, barred by procedural default from raising a constitutional claim on direct appeal, cannot relitigate that claim in a § 2254 habeas corpus proceeding without showing cause for, and prejudice from, the default);

tions on the access of state prisoners to federal habeas corpus continue to press their cause.[2]

In October 1987, President Reagan launched another attack,[3] recommending the enactment of the Criminal Justice Reform Act of 1987 (CJRA)[4] which includes a proposal to restrict the access of state prisoners to federal habeas corpus; this proposal is popularly known as the "Reform of Federal Intervention in State Proceedings Act of 1987" (RFISPA).[5] The Supreme Court's limitations[6] and congressional proposals[7] have been discussed in detail elsewhere. This Article addresses the RFISPA because it is the model upon which future efforts to restrict the access of state prisoners to federal habeas corpus will probably be based.

Section I of this Article examines the proposed legislation. Section II reviews the justifications for limiting the access of state prisoners to federal habeas corpus[8] and challenges their validity.[9] Proponents of restricted access

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Engle v. Isaac, 456 U.S. 107 (1982) (principle of *Sykes* not limited to cases in which the constitutional error did not affect the truth finding of the trial). For a general discussion of the Supreme Court's decisions limiting access to federal habeas corpus, see W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 27 (1984) [hereinafter W. LAFAVE]; C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE ch. 33 (2d ed. 1986).

2. For a summary of Congress's thirty-year attempt to impose a process limitation, see Olsen, *Judicial Proposals to Limit the Jurisdictional Scope of Federal Post-Conviction Habeas Corpus Considerations of the Claims of State Prisoners*, 31 BUFFALO L. REV. 301, 334 nn.178, 179 (1982). *See also* L. YACKLE, POSTCONVICTION REMEDIES § 19, 92 nn.40-41 (1981); Remington, *State Prisoner Access to Postconviction Relief—A Lessening Role for Federal Courts; An Increasingly Important Role for State Courts*, 44 OHIO ST. L.J. 287, 292-96 (1983); Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609 (1983); Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners — Reform or Revocation?*, 61 GEO. L.J. 1221 (1973); Remington, *Change in the Availability of Federal Habeas Corpus: Its Significance for State Prisoners and State Correctional Programs*, 85 MICH. L. REV. 570 (1986).

3. For a discussion of previous attempts by the Reagan Administration to limit federal habeas corpus, see Yackle, *The Reagan Administration's Habeas Corpus Proposals*, *supra* note 2.

4. S. 1970, 100th Cong., 1st Sess. (1987). This bill, introduced by Senator Thurmond at the request of the Reagan Administration, is similar to an earlier habeas corpus measure which Senator Thurmond introduced as follows: "The proposal is generally the same as S. 1763 of the 98th Congress, which . . . passed . . . the full Senate by a vote of 67 to 9 in 1984." H.R. DOC. NO. 117, 100th Cong., 1st Sess. 37 (referring to S. 1763, 98th Cong., 1st Sess. (1983)).

5. S. 1970, 100th Cong., 1st Sess. (1987).

6. *See supra* note 1.

7. *See supra* note 2.

8. The law review literature on the justifications for further limitations on state prisoner access to federal habeas corpus is voluminous. *See e.g.*, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 75 HARV. L. REV. 441 (1963); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). For a more contemporary discussion of the availability of habeas corpus to state prisoners, see Haddad, *The Finality Distinction in Supreme Court Retroactivity Analysis: An Inadequate Surrogate for Modification of the Scope of Federal Habeas Corpus*, 79 NW. U.L. REV. 1062 (1984-85); Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128 (1986); Pagano, *Federal Habeas Corpus for State Prisoners: Present and Future*, 49 ALB. L. REV. 1 (1984); Note, *Emerging Jurisdictional Doctrines of the Burger Court: A Doctrine of Convenience*, 59 ST. JOHN'S L. REV. 316 (1985).

9. I have benefited from the views of both Professor Graham Hughes and Professor Larry Yackle, who also delivered papers at the colloquium. Both Hughes and Yackle argue effectively

claim that it will relieve the overburdened federal judiciary, recognize the importance of state courts in a federal system, reinvigorate the deterrent impact of state criminal justice systems, and encourage prisoner rehabilitation.[10]

None of these proffered justifications survive careful scrutiny. The effect of restricted access on the federal judiciary is likely to be minimal since habeas petitions by state prisoners comprise but a small percentage of the federal civil docket, a percentage that has steadily declined since the 1970s.[11] Similarly, the argument that restricted access significantly improves federal-state relations, while not completely invalid, is, nonetheless, of declining significance.[12] Finally, limiting access to federal habeas corpus will not improve the effectiveness of the state criminal justice systems and might very well detract from their effectiveness.[13]

The final section of this Article assesses the impact that the proposed

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for broad access for state prisoners to federal habeas corpus because the federal courts have a special responsibility to enforce the federal Constitution; precluding access in a meritorious case because of a defense counsel's default is simply unjust. *See* Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321 (1987-88); Yackle, *The Misadventures of Postconviction Remedies*, 16 N.Y.U. REV. L. & SOC. CHANGE 359 (1987-88).

For the best empirical study of the review of state court judgments by federal courts, see P. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS (Federal Justice Research Program Office for Improvements in the Administration of Justice, July 1979).

10. These are the reasons stated most effectively by Justice Powell in his concurring opinion in Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Powell's concurrence is usually cited by those who testify before congressional committees considering limitations on the access of state prisoners to federal habeas. In *Schneckloth*, Justice Powell wrote that "the present scope" of state prisoner access to federal habeas corpus has produced certain undesirable consequences, including:

> the burden on the system, in terms of demands on the courts, prosecutors, defense attorneys, and other personnel and facilities; the absence of efficiency and finality in the criminal process, frustrating both the deterrent function of the law and the effectiveness of rehabilitation; the undue subordination of state courts, with the resulting exacerbation of state-federal relations; and the subtle erosion of the doctrine of federalism itself.

Id. at 274.

It is important to note that although Justice Powell's writings in *Schneckloth* are often cited by proponents of further limitations on federal habeas corpus, Justice Powell does believe in access to federal habeas where there is a possibility of "innocence." In *Schneckloth*, Justice Powell wrote, "If these consequences flowed from the safeguarding of constitutional claims of innocence they should, of course, be accepted as a tolerable price to pay for cherished standards of justice at the same time that efforts are pursued to find more rational procedures." *Id.*

11. Coyle, *Use of Habeas Writ Imperiled by Study*, Nat'l L.J., Nov. 28, 1988, at 1, col. 1 (reporting that "[t]he largest modern day increase in state prisoner habeas corpus filings in federal district courts occurred between 1961 and 1970," but that habeas corpus filings in those courts decreased from 10.4 percent of all civil filings in 1970 to an average of about 4 percent during the 1970s).

12. *See infra* text accompanying notes 40-49.

13. *See infra* text accompanying notes 50-62.

While some of these conclusions are based on fairly adequate data, others are largely impressionistic. Sufficient data exist, for example, to draw conclusions regarding the impact of the RFISPA on federal courts. *See, e.g.*, Coyle, *supra* note 11. Data regarding the impact of

changes would have on the work of the federal courts, on the work of the state courts (especially on the state trial judge[14] and defense counsel[15]) and on state prisoner and correctional agencies. It concludes that the proposed legislation

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change on state trial judges, defense counsel, state prisoners and correctional agencies, however, are very limited.

In this Article, conclusions regarding the impact of change on the work of the state trial judge are based on the author's twenty-five years of experience with a group of Wisconsin trial judges who are responsible for improving the procedures which govern the work of the trial judge in criminal cases. *See* WISCONSIN JURY INSTRUCTIONS—CRIMINAL (1988) (a four-volume set of jury instructions and recommended procedures which is the product of this group's efforts and which Wisconsin trial judges use in all cases).

Conclusions regarding the likely impact of change on state prisoners and state correctional agencies reflect the author's twenty-five years of experience with the University of Wisconsin Law School's Legal Assistance to Institutionalized Persons Program (LAIP), which serves the inmates of Wisconsin's correctional institutions. The LAIP program is funded by the Wisconsin Law School and the Wisconsin Division of Corrections. It offers legal assistance, including postconviction assistance, to inmates who are confined in Wisconsin's maximum, medium and minimum security institutions. Wisconsin requires the Division of Corrections to ensure that inmates have access to adequate legal services. *See* WIS. ADM. CODE § HSS 309.28 (1981).

14. Although this subject requires further attention, useful efforts have been made to deal with the issue. Over twenty years ago, Dan Meador discussed the importance of state trial judges' developing new procedures, particularly in response to Fay v. Noia, 372 U.S. 391 (1963) (discussed below). *See* Meador, *The Impact of Federal Habeas Corpus on State Trial Procedures*, 52 VA. L. REV. 286 (1966). Meador wrote that "the judge must take a much more active, affirmative role in the trial in order to protect the resulting conviction. He cannot be a mere umpire, as has been customary in many places." *Id.* at 290. Professor Meador's concern at the time was with the *Noia* deliberate bypass test, requiring a knowing waiver by a defendant. Today his concern is with the issue of "cause," whether there was reason, usually ineffective assistance of counsel, for the failure to comply with state procedural requirements.

A decade after the Meador article, Professor Spritzer wrote: "A judge is not a mere arbiter. Within limits he has a protective role to perform. If a state trial judge might have readily avoided a default, but failed to do so, there is surely less reason to be deferential to state interests and orderly procedure." Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473, 510 (1978). Spritzer concluded that "the Court should condition non-exercise of the federal habeas jurisdiction upon the employment of strengthened measures to avoid procedural default in the first place." *Id.* at 514. An additional decade later, Professor Meltzer again addressed the issue and concluded that we should "increase the responsibility of the trial judge to see that important federal constitutional issues that should be raised are raised." Meltzer, *supra* note 8, at 1235.

Further explorations of what state judges can and should do are necessary. The model to which commentators usually refer is the guilty plea procedure, but little attention has been given to other situations in which the state trial judge needs to take affirmative action to ensure that the decision of the defendant is adequately informed.

15. Commentators have paid relatively little attention to the question of whether greater reliance can be placed on defense counsel to ensure that the defendant's decisions are adequately informed. Meltzer identifies expanding the role of defense counsel as an alternative to a more active trial judge, but points out the difficulties in accomplishing such an objective. He does not give detailed consideration to whether it is feasible to give defense counsel greater responsibility for ensuring that the defendant makes an informed decision. *See* Meltzer, *supra* note 8, at 1234. Professor Resnik discusses the desirability of greater defense counsel responsibility in somewhat greater detail. *See* Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 1016-22 (1984). She does not, however, attempt to develop in any detail how defense counsel might effectively be given greater responsibility. *See also* Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1165-66 n.119 (1982) ("If waiver of basic constitutional and statutory claims rests on the defense attorney's actions, . . . then courts must ensure effective assistance of counsel.").

would impose new burdens on the administration of criminal justice, on the rehabilitation of state prisoners and on state correctional agencies.

I.
THE REAGAN ADMINISTRATION'S PROPOSAL

In October 1987, at the request of the Reagan Administration, Senator Strom Thurmond introduced the CJRA and the RFISPA.[16] This bill proposes the following changes to the current body of habeas law:[17]

(1) The access of a state prisoner to federal habeas corpus would be precluded where she received a full and fair hearing in the state court.[18] If adopted, this proposal would impose a new limitation not found in current law.[19]

(2) Failure to raise an issue in state court because of a procedural default would similarly preclude access to federal habeas corpus[20] unless, of course, the state prisoner can show "cause" for the procedural default and "prejudice" resulting from it.[21] This proposal would codify and, perhaps, clarify the limitations which current case law prescribes.[22]

(3) A state prisoner would also be denied access to federal habeas corpus if one year passed since she had exhausted state remedies.[23] This limitation is more stringent than those currently imposed by court rule.[24]

The cumulative effect of these proposals would be to limit the access of state prisoners to federal habeas corpus to those situations in which the petition is filed within one year of the exhaustion of state remedies and either (1) the state hearing was not full and fair, or (2) "cause" exists for the defendant's failure to raise the issue in the state court and "prejudice" results from

16. In his 1987 message proposing the CJRA, President Reagan complained that "[s]tate prisoners are now free to relitigate their convictions and sentences endlessly in the lower Federal courts." Message to the Congress on October 16, 1987, H.R. DOC. NO. 117, *supra* note 4, at 1.

17. Current habeas corpus law is codified at 28 U.S.C. §§ 2241-2255 (1982).

18. S. 1970, *supra* note 4, at § 205(d).

19. For some of the limitations on access to federal habeas which the Supreme Court has imposed, see *supra* note 1. For a more complete discussion, see W. LAFAVE, *supra* note 1, at § 27.3(b), (c).

20. S. 1970, *supra* note 4, at § 202(d).

21. The Supreme Court established the cause-and-prejudice requirement in Wainright v. Sykes, 433 U.S. 72 (1977). Generally, defendants raise the issue of ineffective assistance of counsel in order to satisfy the cause-and-prejudice requirement.

22. H.R. DOC. NO. 117, *supra* note 4, at 38; S. REP. NO. 226, 98th Cong., 1st Sess. 15 (1983). The proposal would bar access to federal habeas corpus unless a procedural default in state court was the result of state action in violation of federal law. It purports to be a codification of Murray v. Carrier, 477 U.S. 478 (1986), and Smith v. Murray, 477 U.S. 527 (1986).

23. S. 1970, *supra* note 4, at § 202(e); S. REP. NO. 226, *supra* note 22. *Cf.* H.R. 5217, 100th Cong., 2d Sess. (1988), which provides for a three-year period which runs only if the state prisoner had "access to an approved state-funded legal assistance program." *Id.* at 2.

24. Existing habeas legislation contains no statute of limitations. 28 U.S.C. § 2254, Rule 9(a) (1982). The Advisory Committee Note points out that Rule 9(a) is not a statute of limitations but rather an incorporation of the equitable doctrine of laches.

this procedural default.[25] Explanatory material accompanying the proposal provides examples in which access to federal habeas would be granted. For instance, a prisoner is not afforded a full and fair hearing if the state court's interpretation of the federal constitutional claim is unreasonable.[26] Also, a procedural default is excusable if it was the result of constitutionally ineffective assistance of counsel.[27]

Whatever the outcome of this particular piece of legislation, general support for the anticrime effort remains strong in Congress. On October 21, 1988, the Senate adopted a rule which requires the chair of the Judiciary Committee to introduce "a bill to modify federal habeas corpus procedure" within fifteen days after receiving the report of a Special Committee on Habeas Corpus Review of Capital Sentences[28] chaired by former Justice Lewis Powell.[29] The rule also provides that the Senate must hold a roll call vote on the submitted proposal.[30]

It is too early to tell what form the proposed legislation will take in the 101st Congress.[31] It is likely, however, that Justice Powell's views, so effec-

25. *See* Wainright v. Sykes, 433 U.S. 72 (1977).

26. H.R. DOC. NO. 117, *supra* note 4, at 40; S. REP. NO. 226, *supra* note 22, at 6.

27. H.R. DOC. NO. 117, *supra* note 4, at 37; S. REP. NO. 226, *supra* note 22, at 12. *See also* R. ALLEN & R. KUHNS, CONSTITUTIONAL CRIMINAL PROCEDURE 186 (1985) ("As more avenues are narrowed to petitioners on habeas, the greater the incentive to relitigate those closed avenues under the rubric of right to counsel.").

28. 134 CONG. REC. H11,108-01 (daily ed. Oct. 21, 1988). Chief Justice William H. Rehnquist appointed retired Justice Lewis F. Powell to head this Special Committee on Habeas Corpus Review of Capital Sentences, a new ad hoc committee of the Judicial Conference of the United States, the policy-making arm of the federal judiciary. Coyle, *supra* note 11, at 1, col. 1.

29. Another reflection of the continuing congressional interest is the introduction on August 11, 1988, of a new proposal by Representative Bill Grant (D. Fla.). This bill, similar in many respects to the Reagan Administration's proposal, differs in one important respect: it fixes the statute of limitations at three years. The statute of limitations starts tolling only if the defendant has access to private counsel or an approved state-funded legal assistance program. H.R. 5217, *supra* note 23. A Special Committee on Habeas Corpus appointed in 1973 by then Chief Justice Warren Burger also recommended that access to counsel be a condition precedent to the start of a period of limitations in habeas proceeding. That committee, chaired by Walter Hoffman and consisting of members Wade McCree, William Webster, Frank Johnson and Alfonso Zirpoli, issued a report in September of 1973. *See* Agenda F-8, September 1973 meeting of the Judicial Conference of the United States. Justice Powell's committee will also consider the role of counsel. *See also* Coyle, *supra* note 11, at 1, col. 1 ("Justice Powell acknowledges that providing counsel at a very early stage has been a problem in the process. 'We will consider that very carefully,' he promises.").

30. 134 CONG. REC. H11,108-09 (daily ed. Oct. 21, 1988).

31. Although the Anti-Drug Abuse Act of 1988 included a provision staying habeas corpus reform pending the Powell Committee's final report, Senator Graham of Texas introduced the Habeas Corpus Reform Act of 1989, S. 271, 101st Cong., 1st Sess. (1989) to "offer focus to the public debate and complement the efforts of the Powell Commission." *See* 135 CONG. REC. S811-01 (daily ed. Jan. 31, 1989) (statement of Senator Graham).

Senator Graham identifies four reasons for additional habeas corpus reform:

> First, the number of petitions filed is increasing at an alarming rate.
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> Beginning in the late 1970's, the filing of federal habeas corpus petitions by state

tively stated in *Schneckloth v. Bustamonte*,[32] will be reflected in his committee's report and will, therefore, influence the form of proposed changes in the availability of federal habeas corpus to state prisoners.

II.
THE PRACTICAL SIGNIFICANCE OF CURRENT FEDERAL HABEAS CORPUS PRACTICE

A. The Burden on the Federal Courts

Congress, judges and commentators frequently stress the need to unburden the federal courts. Professor Charles Alan Wright, for example, has noted that "[f]ederal judges are unhappy at the burden of thousands of mostly frivolous petitions."[33] Similarly, the late Judge Carl McGowan[34] has argued that "[t]he resources of the federal courts at the present time are strained by their own criminal caseloads. They should not have to exercise a supervisory au-

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prisoners increased significantly: 1987 filings of 9524 surpassed the all-time peak figure and represented an increase of thirty-five percent over the 1978 filings.

Second, a significant number of these petitions simply duplicate earlier litigations. According to a Department of Justice study of six district courts and one circuit court, more than thirty percent of the state prisoner habeas corpus petitions were filed by persons who had filed one or more previous federal habeas corpus petitions. More than forty-four percent had previously filed at least one petition in state court.

Third, federal district courts and courts of appeals are unable to keep up with these increases. In 1986 in both federal district courts and U.S. courts of appeals, the number of habeas corpus cases filed exceeded the number of habeas corpus cases resolved.

Although State habeas corpus petitions in 1985 constituted less than eight percent of all federal appeals filed, they constituted almost nineteen percent of the backlog in federal courts.

Fourth, many petitions are filed years after the crime, when evidence is stale or nonexistent. The Department of Justice study found that almost one-third of the habeas corpus petitions were filed more than 10 years after conviction.

135 CONG. REC. S811-01 (daily ed. Jan. 31, 1989) (statement of Senator Graham). The legislation seeks to change existing law in several ways:

For state prisoners: it imposes a 1-year limit on habeas corpus applications, normally running from exhaustion of all possible state habeas corpus petitions and appeals. . . .

This legislation also clarifies present law establishing the requirement that a state prisoner must ordinarily raise all claims in accordance with state rules of procedure or be barred from asserting such claims in a federal habeas corpus proceeding, and clearly states that a federal habeas court petition may be denied on the merits without requiring the exhaustion of state remedies.

Finally, this legislation seeks to relieve the administrative burden on district courts and simplify the appellate process by providing that an appeal from the district court in a habeas corpus proceeding may not be taken unless a certificate of probable cause is issued by a circuit judge.

Id. (statement of Senator Graham).

32. 412 U.S. 218 (1973). *See supra* note 10.

33. 17A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4261, at 269 (1988) [hereinafter C. WRIGHT].

34. Judge McGowan served on the Court of Appeals for the District of Columbia Circuit from 1963 to 1987.

thority over the administration of state criminal laws unless that is plainly necessary in the interest of justice."[35] An analysis of the federal courts' case load, however, makes it difficult to accept this factor as a primary explanation for the continuing attempts to restrict the access of state prisoners to federal habeas corpus review.

First, the major increase in cases filed by state prisoners in federal courts is not in habeas cases but rather in conditions-of-confinement cases brought by state prisoners. For example, while the number of habeas cases handled by federal magistrates increased from 4208 to 7184 during the decade starting in 1977, state prisoner conditions-of-confinement cases increased from 2778 to 17,229.[36] This data is analyzed in greater detail elsewhere.[37] Nonetheless, proposals to alleviate the case load burden on the federal courts continue to focus on habeas corpus petitions. In fact, little attention has been paid to the rapidly escalating case load of conditions-of-confinement cases filed by state prisoners, raising strong doubts as to the sincerity of the reformers' purported primary concern with the federal courts' case load.

Another factor which suggests that the work load of the federal judiciary is not the reformers' primary concern is the limited enthusiasm displayed over the elimination of federal court diversity jurisdiction.[38] The following comment by Senator Hatch is significant: "I think most trial lawyers . . . would be very loath to see federal diversity jurisdiction taken away from the federal courts. There is a lot of justice which has occurred as a result of that ability to go to the federal courts rather than the state courts . . . ."[39] The same argument can certainly be pressed with respect to the access of state prisoners to federal habeas corpus.

In sum, limiting the access of state prisoners to federal habeas corpus is likely to have only a minor effect on the case load of the federal courts. Habeas cases currently account for only a small percentage of federal cases and have been steadily declining since the 1970s. The fact that other reforms

35. McGowan, *The View From an Inferior Court*, 19 SAN DIEGO L. REV. 659, 668 (1982). *See also* Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973).

36. DIR. ADMIN. OFF., U.S. CTS., 1987 ANNUAL REPORT 34 [hereinafter ANNUAL REPORT].

37. *See* Resnik, *supra* note 15, at 950. *See also* M. Galanter, The Life and Times of the Big Six; The Federal Courts Since the Good Old Days (Symposium, New York University, Nov. 14-15, 1987, on the Role of the Federal Courts, 1987); Coyle, *supra* note 11. The habeas cases decreased to 3.9 percent of the federal caseload in 1987. *See* Kannar, *Liberals and Crime*, THE NEW REPUBLIC, Dec. 19, 1988, at 19, 23.

38. *See* 13 C. WRIGHT, *supra* note 33, at § 3601 for a discussion of the history and purpose of diversity jurisdiction. For example, of the 238,982 cases filed in the federal district courts for the annual period ending June 30, 1987, only 11,534, or 5 percent, were habeas corpus petitions. By contrast, diversity suits comprised 67,071, or 28 percent, of the total cases filed. ANNUAL REPORT, *supra* note 36, at Table C2, pp. 177-79.

39. *Senate Judiciary Committee Member Discusses Federal Courts' Role, Specific Legal Issues*, 18 THE THIRD BRANCH 1, 5-6 (Oct. 1986). *See also* Coyle, *supra* note 11, at 26 (noting that diversity cases now comprise twenty-five percent of the civil caseload).

could easily accomplish the same goal of relieving an overburdened federal judiciary renders suspect the current attack on habeas corpus review. That leaves one to consider the other concerns articulated in support of further restrictions on federal habeas: federal-state relations and the effectiveness of state criminal justice systems.

B. The Affront to the State Courts and a Sound System of Federalism

Proponents of further restrictions on federal habeas argue that such claims constitute an affront to state courts and irritate federal-state relations.[40] Justice Powell has referred to this problem as the "undue subordination of state courts, with the resulting exacerbation of state-federal relations."[41] Similarly, Professor Wright has said that "[t]he most controversial and friction-producing issue in the relation between the federal courts and the states is federal habeas corpus for state prisoners."[42] Testimony before the Senate Judiciary Committee reveals that many state appellate court judges and attorneys general concur in Justice Powell's and Professor Wright's assessment.[43] An examination of the reasons for this consensus, however, indicates that it is unfounded.

To the extent that federal habeas constitutes an affront to state judicial autonomy, the affront appears to be limited in two respects. First, only a small percentage of federal habeas cases are successful.[44] Second, federal habeas cases have been declining as a percentage of the federal civil docket, and might well continue on this trend.[45] The affront to federalism, moreover, is as great, if not greater, where the state judicial forum can be completely bypassed. Both federal diversity jurisdiction and conditions-of-confinement cases filed by state prisoners encroach upon federalism in some way. Federal diversity jurisdiction funnels many state matters into federal courts solely because of the haphazard circumstance of the differing domiciles of the parties involved. Conditions-of-confinement cases, raised under 42 U.S.C. section 1983,[46] also allow plaintiffs to bring their actions in federal courts. In con-

40. *See Habeas Corpus Reform Act of 1982: Hearings on § 2216 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 223-30 (1982) (containing the views of a number of state court judges and attorneys general). *See also* Shapiro, *supra* note 35, at 322.

41. Schneckloth v. Bustamonte, 412 U.S. 218, 274 (1973).

42. 17A C. WRIGHT, *supra* note 33, at 268.

43. S. REP. NO. 226, *supra* note 22, at 3.

44. *See infra* note 52.

45. *See supra* note 11.

46. 42 U.S.C. § 1983 (1982) provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

trast, federal habeas procedures at least require that state courts be given the first opportunity to deal with the state issues raised.[47]

Finally, recent changes may lessen the emphasis on federal habeas as an affront to a sound principle of federalism. State prosecutors who are unhappy with the state court's interpretation of the United States Constitution are increasingly using the writ of certiorari to challenge such state court decisions.[48] In fact, many federal court reversals of state court decisions are now the product of requests by state prosecutors by writ of certiorari to the United States Supreme Court.[49] To the extent that these cases constitute an affront to the state judiciary, the fault lies not with the access of state prisoners to federal habeas but rather with the United States Supreme Court's increased willingness to grant certiorari to state prosecutors who are dissatisfied with decisions of their own state courts.

C. *The Impact of Current Habeas Corpus Practice on the Effectiveness of State Criminal Justice Systems*

Proponents of further restrictions on the access of state prisoners to federal habeas corpus frequently claim that federal habeas corpus reduces the effectiveness of state criminal justice systems. In general, proponents argue that federal review detracts from the deterrent effect of state criminal sanctions, from the ability of the police to fight crime, and from the rehabilitation of state prisoners.[50] Deterrence is frustrated because of a lack of finality; law enforcement is frustrated by federal court decisions which expand the scope of existing rights at the expense of effective law enforcement; state prisoner rehabilitation is frustrated because wider access to federal habeas corpus encourages state prisoners to focus on litigation rather than rehabilitation. None of these claims, however, survive careful scrutiny.

1. *The Effect on the Deterrent Function of the Criminal Law*

To the extent that the availability of federal habeas corpus keeps state prisoners' hopes alive it undeniably delays finality. Under normal circumstances, however, it seems unlikely that the availability of federal habeas

47. The rule that prisoners must exhaust state remedies before a federal court will entertain a collateral attack on a state conviction has been codified since 1948 at 28 U.S.C. § 2254(b) and (c). For a more detailed discussion of the exhaustion doctrine, see Shapiro, *supra* note 35, at 355.

48. *See* Florida v. Meyers, 466 U.S. 380, 386 (1984) (Stevens, J., dissenting): "Since the beginning of the October 1981 Term, the Court has decided in summary fashion 19 cases . . . all 19 were decided on the petition of the warden or prosecutor." *See also* Michigan v. Long, 463 U.S. 1032, 1065-70 (1982) (Stevens, J., dissenting): "The result is a docket swollen with requests by States to reverse judgments that their courts have rendered in favor of their citizens."

49. Examples of such cases are cited in Justice Stevens' dissenting opinion in *Meyers*, 466 U.S. at 384-85.

50. *See, e.g.*, Bator, *supra* note 8, at 452. This view is challenged in J. THOMAS, PRISONER LITIGATION, THE PARADOX OF THE JAILHOUSE LAWYER (1988).

corpus significantly frustrates the deterrent function of the law. Four reasons substantiate this assertion.

First, almost without exception, the sentence is implemented when imposed, and the offender goes to prison to serve the sentence. Requests for release on bail pending the decision on federal habeas corpus are routinely denied in state prisoner cases.[51] Second, the current success rate in federal habeas cases is extremely low.[52] This fact was true before the current conservative trend in Supreme Court decisions and continues to be true today.[53] Third, the public's attitude toward the lack of finality is probably formed as much by state court reversals of cases on appeal as it is by federal reversals after habeas corpus review.[54] Finally, if the federal court bases its decision on constitutional violations affecting the reliability of the guilt-finding process, the deterrent function is not well-served by the punishment of those who may not be guilty.

2. *The Effect on Law Enforcment*

Despite the evidence to the contrary, many continue to argue that limiting access to federal habeas corpus will increase the effectiveness of state criminal justice systems.[55] With respect to law enforcement, the perception that decisions such as *Miranda v. Arizona*[56] provide constitutional protections to defendants at the expense of law enforcement is rebutted by the testimony of those who are on the front line, police officers and other law enforcment officials.

In a study sponsored by the American Bar Association's Committee on Criminal Justice in a Free Society, the Committee noted that the vast majority of prosecutors, police, and others interviewed do not believe that these consti-

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51. In twenty years of experience representing state prisoners in federal court in the LAIP program, bail has never been granted pending the decision on federal habeas corpus even after the state prisoner prevailed in the district court.

52. *See, e.g.*, P. ROBINSON, *supra* note 9, at 49 (showing a success rate of about two percent); Shapiro, *supra* note 35, at 334 (demonstrating that only 5 of 243 habeas petitioners in Massachusetts were successful).

53. This is the assumption of the United States Department of Justice. *See* OFF. OF LEGAL POL'Y, REPORT TO THE ATTORNEY GENERAL, FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS 34-35 (1988).

54. Criticism today is less likely to be directed at federal courts, especially in jurisdictions in which the state court decides cases on the basis of the state, rather than the federal, constitution. With respect to the importance of a state court's approach to constitutional issues, see *Interview with Chief Justice Sheran*, 13 THE THIRD BRANCH 1 (March 1981). *See also* State v. Jewett, 146 Vt. 221, 500 A.2d 233 (1985).

55. President Reagan, for example, in urging the adoption of the CJRA, described the proposed limitations as "of critical importance to the suppression of crime and the improved operation of the criminal justice system." *See* H.R. DOC. NO. 117, *supra* note 4, at 1.

56. 384 U.S. 436 (1966). *Miranda* prohibits admitting into evidence a defendant's statements resulting from custodial interrogation unless the law enforcement agent informed the defendant that she has the right to remain silent, that any statement which she makes may be used against her in court and that she has the right to consult with an attorney, whether appointed or retained, and have the attorney present during her interrogation. *Id.* at 479.

tutional protections significantly restricted their ability to fight crime.[57] The constitutional protections being discussed were those, like *Miranda*, which are the subject of review in federal court by means of a writ of habeas corpus.

Professional organizations representing police officers have expressed similar views. For example, in testimony before the Senate Committee on the Judiciary, the president of the International Union of Police Associations - AFL-CIO, stated:

> A comment on the exclusionary rule before I answer this question. Like most police officers, I resented the [exclusionary] rule . . . and the *Miranda* decision as tools aimed primarily at deterring police misconduct. But each has also been an important milestone in increasing police professionalism. They have helped us understand that while fighting crime is an important police responsibility, our primary task is to protect our country's treasured constitutional guarantees. As a consequence, police officers today are better versed in the law and Constitution, have gained sensitivity to the individual rights of citizens, and are far more sensitive to community needs than in the past. We have little enthusiasm about abandoning the exclusionary rule or *Miranda*: they are now part of our professional values and culture.[58]

The police commissioner of Boston recently concurred in this view when he stated that the *Miranda* decision had contributed more to effective law enforcement by encouraging the professionalization of police than it had detracted from effective law enforcement by preventing convictions.[59]

Since there is no hard data supporting the argument that access to federal courts by means of habeas corpus is an impediment to effective law enforcement, the continued criticism of habeas corpus[60] seems to reflect the political judgment that doing so enables one to be perceived as tough on crime without having to confront the terribly difficult problems, drugs in particular, that

57. A.B.A., CRIM. JUST. SEC., CRIMINAL JUSTICE IN CRISIS, A REPORT TO THE AMERICAN PEOPLE AND THE AMERICAN BAR ON CRIMINAL JUSTICE IN THE UNITED STATES: SOME MYTHS, SOME REALITIES, AND SOME QUESTIONS FOR THE FUTURE 5 (1988). The A.B.A. Committee held hearings in three major cities and conducted a methodologically developed opinion poll of nearly 1000 police officers, prosecutors, defense attorneys, and judges.

58. Testimony of Robert B. Kliesmet Before the Senate Committee on the Judiciary, at 3 (opposing the appointment of Robert Bork to the United States Supreme Court) (Sept. 25, 1987) (unpublished transcript, distributed by the International Union of Police Associations, AFL-CIO) (on file with the New York University Review of Law & Social Change).

59. Conference call between Frank J. Remington, Police Commissioner Francis Roache of Boston, and John Frank, Senior Partner of Lewis and Roca, Phoeniz, Arizona (July 22, 1987). Mr. Frank represented Ernesto Miranda before the United States Supreme Court, in Miranda v. Arizona, 384 U.S. 436 (1966).

60. Former Attorney General Edwin Meese III has criticized the *Miranda* rule, claiming that it makes it too hard for police to obtain information from suspects. Andrew L. Frey, the chief criminal law expert in the Solicitor General's office, believes, however, that the Court is unlikely to abandon the *Miranda* rule. *See* Taylor, *Miranda Ruling: Complain, Complain, Complain*, N.Y. Times, Feb. 13, 1987, at A18, col. 3.

must be addressed if the capacity of state governments to deal with crime is to be significantly improved.

3. *The Effect on the Rehabilitation of State Prisoners*

There is virtually no evidence leading to the conclusion that continuing access to federal habeas corpus impedes prisoner rehabilitation. As I have argued before, "continuing access to justice serves, rather than disserves, the goal of prisoner rehabilitation, particularly for those who have an arguable claim of innocence."[61] Professor Paul Freund supports this conclusion, arguing that:

> filing habeas corpus petitions may actually have a positive therapeutic and educational effect on prisoners. Moreover, much of our crime is committed by the underprivileged and disadvantaged, those who find society cruel, unfair, and hypocritical. The concern for equal justice reflected in a system which does not forget such people but continues to attempt to rectify any injustice they may have suffered can also have a significant deterrent and educational effect. On the other hand, rehabilitation is seriously hindered if a prisoner feels he has been the victim of inequitable treatment.[62]

Affording state prisoners access to the courts when they have an arguable basis for challenging the validity of their conviction or sentence, therefore, most probably promotes rather than undermines the criminal justice system's goal of prisoner rehabilitation.

III.
THE LIKELY IMPACT OF PROPOSALS FURTHER LIMITING ACCESS TO FEDERAL HABEAS CORPUS

As discussed above, restricting the access of state prisoners to federal habeas corpus does not serve the purported goals of the proposed legislation. The proposed changes may, in fact, actually make the work of state trial judges and defense counsel more difficult. The changes will probably also adversely affect state prisoners and state correctional programs.

A. The Potential Impact on the Work of State Trial Judges

It seems fairly evident that the burden on state trial judges will likely

61. Remington, *Change in the Availability of Federal Habeas Corpus: Its Significance for State Prisoners and State Correctional Programs*, 85 MICH. L. REV. 570, 580 (1986).

62. Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 744 n.130 (1966).

My own experience working with inmate paralegals in Wisconsin supports Freund's conclusion. It also indicates that affording greater access to courts in meritorious cases encourages rather than discourages the development of reading, writing and other important abilities. The program is described in detail in Kempinen, *Prisoner Access to Justice and Paralegals: The Fox Lake Paralegal Program*, 14 NEW ENG. J. OF CRIM. & CIV. CONFINEMENT 67 (1988).

increase as a result of any further restriction on federal habeas. In particular, the CJRA's effort to preclude access to federal habeas corpus where prisoners are guilty of a state court "procedural default" or because they have received a "full and fair" hearing renders the job of the trial judge more difficult.

If the CJRA is to limit effectively the ability of state prisoners to bring federal habeas, state trial judges must assume the burden of ensuring that there are no grounds for access to federal habeas. Thus, the state trial judge must ensure that there is a "full and fair" hearing.[63] Judges presumably always do work to ensure that hearings are indeed full and fair, but the inclusion of such a provision within the CJRA might result in greater attention and enforcement. In addition, despite the existence of the "procedural default" bar, the defendant can still invoke federal habeas review if she can show that there was "cause" for the procedural default and "prejudice" resulting from it.[64] State trial judges, therefore, must work to minimize the risk of procedural defaults which give rise to "cause" and "prejudice"; in general that means that state trial judges must ensure that defense counsel is competent and effective and that the defendant has had an opportunity to make an informed decision with respect to all issues in question. To date, the question of how the cause-and-prejudice requirement will affect the work of the state trial judge has been given some, but not adequate, attention.

In one thoughtful treatment of the subject, Professor Daniel Meltzer concludes that effective implementation of the procedural default bar to federal habeas corpus will require state courts to implement one of two alternatives: either increase the capacity of defense counsel to furnish effective representation or increase the "responsibility of the trial judge to see that important federal constitutional issues that should be raised are raised."[65] Professor Meltzer correctly notes that "such judicial intervention . . . imposes resource and other costs"[66] and also points to the guilty plea procedure as an illustration of how greater responsibility can be placed on the trial judge although he does acknowledge this procedure's limited effectiveness.[67]

Professor Judith Resnik identifies the same two alternatives as ways of improving trial court decision-making.[68] She explains that "the model for judicial supervision of criminal trials comes from the ritual that now surrounds the taking of guilty pleas"[69] but notes the difficulties of "[i]nstalling trial judges as supervisors . . . . [J]udges may go through the ritual of checking into attorney adequacy, but may do so only to protect themselves from reversal.

63. *See supra* text accompanying note 18.

64. For a more complete discussion of the cause-and-prejudice requirement, see W. LAFAVE, *supra* note 1, at § 27.4(d), (e).

65. Meltzer, *supra* note 8, at 1235. *See also* Remington, *Post-Conviction Review—What State Trial Courts Can Do to Reduce Problems*, 72 JUDICATURE 53 (1988).

66. Meltzer, *supra* note 8, at 1235.

67. *Id.*

68. Resnik, *supra* note 15.

69. *Id.* at 1019.

Thus, the records may look impressive while the process remains unimproved."[70]

Experience with increasingly detailed guilty plea procedures suggests that a trial judge's task will be both time-consuming and difficult as she attempts to ensure that all federal constitutional issues that should be raised are indeed raised by the defendant. Arguing for increasing the trial judge's responsibility, Professor Resnik maintains that "state courts have already mandated that judges take charge of other aspects of criminal trials."[71] In fact, numerous examples of the increasing responsibility of state trial judges, in addition to the possible acceptance of a guilty plea, can be cited. Examples include: (1) ensuring against conflict in joint representation;[72] (2) ensuring that a defendant understands the right of appeal;[73] (3) ensuring that a defendant knows of the right, in appropriate situations, to have a lesser included offense submitted to the jury;[74] (4) ensuring that a defendant is competent to stand trial,[75] and (5) ensuring that a mentally ill defendant knows of the right to plead not guilty by reason of insanity.[76] Other duties will probably be added to this already substantial list.[77]

The extra cost of time and effort may be worthwhile if increasing the responsibility of the trial judge actually improves the administration of justice and does not result simply in additional ritual. Accomplishing this goal will be difficult. At the least, it will require the development of new state court procedures. Even with new procedures, however, there is some doubt whether a state trial judge can improve the administration of justice, without a concomitant improvement in the effectiveness of defense counsel.

B. The Potential Impact on the Work of Defense Counsel

One alternative to increasing the burden on the state trial judge is to in-

70. *Id.* at 1020.

71. *Id.* at 1019.

72. FED. R. CRIM. P. 44(c) provides, in part, that "the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel. . . ." Rule 44 has served as a model, adopted frequently in state practice.

73. *See, e.g.*, FED. R. CRIM. P. 32(a)(2), Sentence and Judgment, Notification of Right to Appeal. Rule 32(a)(2) reflects common state practice.

74. *See* 3 WISCONSIN JURY INSTRUCTIONS—CRIMINAL SM6 (1988): JURY INSTRUCTIONS ON LESSER INCLUDED OFFENSES (1980). These instructions recommend a lesser included offense procedure for Wisconsin trial judges.

75. *See* State v. Johnson, 133 Wis. 2d 207, 395 N.W.2d 176 (1986) *discussed in* Remington, *supra* note 65, at 56. In *Johnson*, the Wisconsin Supreme Court held that the trial judge rather than defense counsel has the responsibility to decide whether it was in the defendant's interest to raise the issue of his competency to stand trial.

76. *See* Anderson v. Sorrell, 481 A.2d 766 (D.C. App. 1984) (discussing the state judge's responsibility to ensure that a defendant has made an informed decision whether to raise an insanity defense).

77. Some of these issues are discussed in detail in Remington, *The Changing Role of the Trial Judge in Criminal Cases — Ensuring That the Sixth Amendment Right to Assistance of Counsel Is Effective*, 20 U.C. DAVIS L. REV. 339 (1987).

crease defense counsel's responsibility to ensure effective representation. Whether this proposal is a practical alternative has not been adequately addressed.[78]

Several commentators have, however, stressed the overall importance of such a proposal. Professor Barbara Babcock, for example, urges that improving the quality of defense counsel is an inevitable cost of the adversary system, particularly in light of such severe consequences as punishing the defendant for the procedural defaults of the attorney.[79] Professor Babcock points to the importance of the "function of an effective lawyer [which] is to include the client in the decisions — to educate him and interpret for him the ceremony in which he is the chief participant."[80] She notes, however, that "[b]reathing life into the lawyer who stands beside the indigent accused will be expensive."[81]

Professor Resnik proposes a less costly alternative, one that focuses on educating defendants about the criminal law and the trial process:

> An alternative would be to educate criminal defendants and their attorneys about the trial process in an effort to enhance the ability of clients to monitor their attorneys' work and to improve the level of services provided. Because most defendants are poor, they cannot retain attorneys and have no purse strings to pull. The provision of dollars and thus of economic clout would be one option, but, as already noted, a politically unlikely one. In lieu of dollars, however, clients could be equipped with information. The government might give criminal defendants detailed information, describing the kinds of defenses available and the decisions attorneys should be making upon consultation with their clients. Defendants who are unhappy about their attorneys' decisions could complain to trial judges, who would be obliged to hold hearings about the alleged inadequacies.[82]

Increasing the trial judge's responsibility without also increasing defense counsel's responsibility may result in defense counsel doing less rather than more. For example, if the judge takes it upon herself to ensure that the plea is informed and voluntary, defense counsel may well conclude that it is no longer her responsibility. Similarly, if the trial judge must inform the defendant of her right to an appeal and to postconviction review, defense counsel may not take the time to do so. Clearly, adequate decision-making by the trial court requires the best efforts of both trial judge and defense counsel. Unfortunately, adequate methods of ensuring this have not yet been developed.

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78. For a helpful discussion of efforts to increase the effectiveness of defense counsel, see Comment, *Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims*, 130 U. PA. L. REV. 981, 1000-03, 1005-06 (1982).

79. Babcock, *supra* note 15.

80. *Id.* at 1171 n.139.

81. *Id.* at 1173.

82. Resnik, *supra* note 15, at 1021.

C. The Potential Impact on State Prisoners

Unlike the United States Supreme Court which has always kept the door of the federal courthouse open to the arguably innocent, proposals such as those of the Reagan Administration will prevent all access to federal habeas corpus if the petition is filed later than one year after the exhaustion of state remedies. There are a few exceptions, however, such as cases where the Supreme Court has recently recognized a new right[83] or where the petitioner demonstrates the existence of a new factual basis for the claim which could not have been discovered earlier through the exercise of reasonable diligence.[84] Clearly, however, less emphasis is given to the possibility of innocence than would be recognized by, for example, Justice Powell's view that where the burden of habeas corpus cases "flowed from the safeguarding of constitutional claims of innocence they should, of course, be accepted as a tolerable price to pay for cherished standards of justice."[85]

As already noted above, restricting access to federal habeas corpus will do more damage to prisoner rehabilitation than it may do good.[86] The denial of relief on procedural grounds rather than on the merits, in an increasing number of cases, is more likely to result in frustration and further alienation than in a constructive inmate response to correctional treatment.[87]

D. The Potential Impact on State Correctional Programs

It is easier to anticipate the effect of further limitations on the access of state prisoners to federal habeas corpus on state correctional agencies, particularly prison staff. Administrators of already overcrowded prisons have no interest in keeping prisoners in prison who ought not be there or who ought not serve as lengthy a sentence as that imposed.[88] The prisoners who are most troublesome for prison administrators are those who believe that they have

83. This "new law" exception is the subject of a case awaiting decision in the U.S. Supreme Court, Zant v. Moore, No. 87-1104. *Zant* was argued on November 29, 1988. *See* 44 Crl 4099 (Dec. 7, 1988). *See also* Moore v. Zant, 734 F.2d 585 (11th Cir. 1984).

84. H.R. Doc. 117, *supra* note 4, at 5.

85. Schneckloth v. Bustamonte, 412 U.S. 218, 274 (1973).

86. *See supra* text accompanying notes 61-62.

87. "The availability of the writ and the access to a judicial forum . . . may serve valuable functions simply by providing prisoners with hope during their incarceration and by acting as a safety valve that prevents destructive and violent behavior." P. ROBINSON, *supra* note 9, at 4.

The author's firsthand experience with state prisoners over a period of twenty years supports this conclusion. The author believes that for the career criminal with the relatively moderate sentence, the proposal's impact will be slight because she will understand that the time it takes to receive a hearing in federal court makes reliance on the federal courts unrealistic. By the time relief is granted, the sentence may well have been served. The career criminals with long sentences, however, will attempt to go to federal court even if the chances for success are very remote. Still, it is unclear whether this group of inmates, if denied access to federal court, will turn to either more constructive or more destructive alternatives in place of continuing litigation over the propriety of their conviction or sentence.

88. This fact is reflected in the financial support which both the Wisconsin Division of Corrections and the United States Bureau of Prisons have given to the LAIP program and in the endorsement which wardens and correction's staff members have given the program.

been unfairly convicted or that they have received an unduly long sentence and, with nowhere else to turn, abandon all hope. The Cubans who came to the United States in the Mariel boatlift, the so-called "Marielitos," are an extreme, but significant, example of this view.[89] When it became clear to these prisoners that they had no realistic expectation of a meaningful court hearing, they turned to violence, seriously damaging two federal correctional institutions.[90]

Restricting access to the federal courts by instituting increasingly complicated procedural requirements is likely to make the task of state corrections administrators more difficult, especially if those requirements prevent inmates with colorable claims of innocence from having their claims adjudicated on the merits. Additional emphasis on procedural requirements not only frustrates inmates, but some corrections administrators are convinced that it also encourages them to become preoccupied with the procedures and detailed rules of the prison, probation and parole.[91] The inmate's response seems to be: "if you require me to conform to complicated procedural rules that have little to do with the merits, I am going to hold you, the correctional administrator, to the letter of these increasingly detailed rules. It makes no difference to me that enforcement of the rules does not make sense in every situation." When inmates constantly challenge formal procedures, they distract corrections administrators from the more significant task of developing more effective correctional programs.

CONCLUSION

Further restrictions on the access of state prisoners to federal habeas corpus seem clearly to be unnecessary. The federal courts' habeas corpus case load is declining, at least as a percentage of the work of the federal courts. State judges are much less concerned about federal habeas corpus than they were in the past. Finally, those who administer state criminal justice systems, police and prosecutors in particular, recognize that the involvement of the federal courts in the review of state prisoner cases does not significantly interfere with their efforts to deal more effectively with the serious crime problems which exist in this country.

The United States Supreme Court, through its decisions, has already imposed significant restrictions on federal habeas corpus. It is doubtful that these restrictions have been beneficial. Courts now spend a great deal of time

89. *See* Audet, *Representing the Institutionalized Mariel Cubans—The Wisconsin Experience*, 1987 WIS. L. REV. 455.

90. *See* Remington, *Foreword to Audet*, 1987 WIS. L. REV., 455, 457 ("For all of us it is a lesson in understanding what happens when government treats people inhumanely, creating an entire class of people who have no hope. They revolt, take hostages, destroy two major federal correctional institutions [Atlanta, Georgia and Oakdale, California]. Deprived of hope, what is there to lose?").

91. Wisconsin Law Professor Walter Dickey, who served from 1983 to 1987 as administrator of the Wisconsin Division of Corrections, holds this view.

on the various procedural obstacles that have been erected, time which might be better spent on the substantive issues involved. Further limitations of the kind suggested in recent proposals will make this problem worse.[92]

Perhaps the most significant benefit of the changes that have already been implemented lies in the increasing recognition of the importance of the state courts and of the need to improve state court procedure and representation by defense counsel. These improvements, though costly, are necessary if state courts are to enforce basic constitutional guarantees and defendants are to be able to make adequately informed decisions about their own future.

Although I agree with Professor Resnik's conclusion[93] that the emphasis on first-tier decision-making by the state trial courts should be strengthened, I believe that the burden ought not be placed on the state trial judge alone.[94] Defense counsel must assume increased responsibility for ensuring effective representation of the defendant at the trial stage. Even if the effectiveness of trial judges and defense counsel in the state courts vastly improves, federal relief should never be completely precluded or obscured by a procedural maze, least of all for those prisoners who are convinced of their innocence. This group should include not only those who have not committed a criminal offense but also those who have committed a less serious offense or a lesser number of offenses and those who have received an overly severe sentence, assuming, of course, that in each class of cases the claim is one of a deprivation of a federal constitutional right. Focusing attention on these cases is in the interest of justice, will not unduly burden federal courts, will minimize federal-state irritation and will best serve the legitimate interests of state prisoners and state correctional programs.[95]

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92. *See* Memorandum from Chief Judge Donald P. Lay of the Eighth Circuit to Mr. Justice Powell (Feb. 10, 1989) in which Judge Lay stresses this point (on file with the New York University Review of Law & Social Change).

93. Professor Resnik's view is set forth in her article, *Tiers*, *supra* note 15.

94. *See* Remington, *supra* note 77, at 339.

95. For an effective presentation of an opposing view, *i.e.*, that criminal convictions should sometimes be reversed for reasons unrelated to the reliability of the fact finding process, see Stacy & Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79 (1988).